



Office of the Attorney General
State of Texas

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January 31, 1994

Mr. David T. Tatum
Interim Executive Director
Texas Commission on Alcohol
and Drug Abuse
720 Brazos Street, Suite 403
Austin, Texas 78701-2576

Letter Opinion No. 94-013

Re: Whether the Texas Commission on Alcohol and Drug Abuse may investigate a complaint regarding the conduct of a person practicing as a chemical dependency counselor if the alleged conduct occurred prior to January 1, 1992 (ID# 22548)

Dear Mr. Tatum:

Your predecessor asked us whether the Texas Commission on Alcohol and Drug Abuse (the "commission") may investigate a complaint regarding the conduct of a person rendering chemical dependency counseling or chemical dependency counseling-related services if the alleged conduct occurred prior to January 1, 1992. We conclude that it may investigate complaints alleging certain violations of V.T.C.S. article 4512*o*, section 16.

Pursuant to V.T.C.S. article 4512*o*, section 2, no person may engage in the practice of chemical dependency counseling¹ services unless the person is properly licensed as a chemical dependency counselor.² See V.T.C.S. art. 4512*o*, § 10 (establishing

¹Section 1(6) of article 4512*o*, V.T.C.S., defines "chemical dependency counseling" as "assisting an individual or group to develop an understanding of chemical dependency problems, define goals, and plan action reflecting the individual's or group's interest, abilities, and needs as affected by claimed or indicated chemical dependency problems." See also 40 T.A.C. § 150.1.

²Section 1(3) of article 4512*o*, V.T.C.S., defines "chemical dependency counselor" as "a person who renders, for compensation, chemical dependency counseling or chemical dependency counseling-related services to an individual, group, organization, corporation, institution, or the general public, who implies that the person is licensed, trained, or experienced in chemical dependency counseling, and who holds a license issued under this Act to engage in the practice of chemical dependency counseling." See also 40 T.A.C. § 150.1. Section 3(a) exempts from the provisions of article 4512*o* a person who does not represent to the public, directly or indirectly, that he or she is licensed as a chemical dependency counselor and who does not use any name, title, or designation indicating that he or she is licensed as a chemical dependency counselor. See also 40 T.A.C. § 150.3(a). Additionally, article 4512*o* does not apply to the following persons:

- (1) a person employed as a counselor by a federal institution, if the person is performing chemical dependency counseling within the scope of the person's employment;

licensure and examination requirements); *see also* 40 T.A.C. §§ 150.2, 150.9 - 150.11. Unless a person is properly licensed under article 4512o or is specifically exempted from article 4512o, the person may not refer to himself or herself as a chemical dependency counselor or represent in any way that the person is authorized to practice chemical dependency counseling. V.T.C.S. art. 4512o, § 12; *see also* 40 T.A.C. § 150.12. Additionally, a licensed chemical dependency counselor must comply with standards of conduct and ethics that the commission has established in accordance with section 5(a)(2). *See id.* § 150.22.

Article 4512o empowers the commission to enforce the article and rules the commission has promulgated under the article. V.T.C.S. art. 4512o, § 5(a)(1), (3); *see also* 40 T.A.C. § 150.5(a)(1), (3). Section 16 of article 4512o authorizes the commission to take disciplinary action against any person who commits any of the following acts:

- (1) violating or assisting another to violate this Act or a rule of the commission adopted under this Act;
- (2) circumventing or attempting to circumvent this Act or a rule of the commission adopted under this Act;
- (3) participating, directly or indirectly, in a plan the purpose of which is the evasion of this Act or a rule of the commission adopted under this Act;
- (4) engaging in false, misleading, or deceptive conduct as defined by Section 17.46, Business & Commerce Code;
- (5) engaging in conduct that discredits or tends to discredit the profession of chemical dependency counseling;

(footnote continued)

(2) a student, intern, or trainee pursuing a course of study in counseling at a regionally accredited institution of higher education or training institution, if those activities and services constitute a part of the supervised course of study and the person is designated as a "counselor intern";

(3) a person who is not a resident of this state if:

(A) performed for not more than 30 days during any year; and

(B) the person is authorized to perform the activities and services under the laws of the state of the person's residence; or

(4) a licensed physician or psychologist, licensed professional counselor, certified social worker, religious leader of a congregation providing pastoral chemical dependency counseling within the scope of his or her duties; or school counselor certified by the Central Education Agency.

V.T.C.S. art. 4512o, § 3(b); *see also* 40 T.A.C. § 150.3(b). *But see* V.T.C.S. art. 4512o, § 3(c); 40 T.A.C. § 150.3(c).

(6) revealing or causing to be revealed, directly or indirectly, a confidential communication made to the licensed chemical dependency counselor by a client or recipient of services, except as required by law;

(7) having a license to practice chemical dependency counseling in another jurisdiction refused, suspended, or revoked for a reason that the commission finds would constitute a violation of this Act or a commission rule established under this Act;

(8) refusing to perform an act or service for which the person is licensed to perform under this Act on the basis of the client's or recipient's age, sex, race, religion, national origin, color, or political affiliation; or

(9) committing an act in violation of Section 21.14, Penal Code, or for which liability exists under Chapter 81, Civil Practice and Remedies Code.

V.T.C.S. art. 4512o, § 16 (as amended by Acts 1993, 73d Leg., ch. 573, § 2.04, at 2157, 2166); *see also* 40 T.A.C. § 150.16. The commission may refuse to issue a license to an applicant for a license to practice chemical dependency counseling who has engaged in any of the listed activities. V.T.C.S. art. 4512o, § 16 (as amended by Acts 1993, 73d Leg., ch. 573, § 2.04, at 2157, 2166); *see also* 40 T.A.C. § 150.16. Additionally, the commission may refuse to renew a license, place on probation a license holder whose license has been suspended, reprimand a license holder, or revoke or suspend a license. V.T.C.S. art. 4512o, § 16 (as amended by Acts 1993, 73d Leg., ch. 573, § 2.04, at 2157, 2166); *see also* 40 T.A.C. § 150.16. A person who violates the act may be subject to a civil penalty in addition to disciplinary action by the commission. V.T.C.S. art. 4512o, §§ 16 (as amended by Acts 1993, 73d Leg., ch. 573, § 2.04, at 2157, 2166), 18; *see also* 40 T.A.C. §§ 150.16 - 150.18.

Complaints from private citizens and others alert the commission to alleged violations of article 4512o and the regulations the commission has promulgated under article 4512o. V.T.C.S. art. 4512o, § 17(a). The commission is authorized to receive from any person a written, sworn charge alleging a violation of the article. *Id.*; *see also* 40 T.A.C. § 150.17(a). The commission investigates the charge to determine if disciplinary action is warranted. *Id.* If the commission determines that a disciplinary action is warranted, it must comply with the procedural provisions located in article 4512o, section 17, V.T.C.S. *See also* 40 T.A.C. § 150.17.

Except for article 4512o, section 2, which requires every person who engages in the practice of chemical dependency counseling to be licensed as a chemical dependency counselor, article 4512o became effective September 1, 1991. *See* Acts 1991, 72d Leg., ch. 635, § 22, at 2334, 2340. Section 2 became effective January 1, 1992. *Id.*; *see also* V.T.C.S. art. 4512o, § 20(a); 40 T.A.C. § 150.20(a). Your predecessor questioned

whether the commission may investigate a complaint against a person who violates article 4512*o* if the alleged violation occurred prior to January 1, 1992.

Article I, section 16 of the Texas Constitution prohibits the enactment of any retroactive law. *See generally* 1 D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 58-62 (1977); 12A TEX. JUR. 3d *Constitutional Law* §§ 237-244 (1993). As this prohibition has been construed, it precludes the enactment of a law that deprives or impairs vested substantive rights acquired under existing law or that creates new obligations, imposes new duties, or adopts new disabilities in respect to past transactions. 12A TEX. JUR., *supra*, § 238, at 697. In general, a statute will be construed to operate prospectively unless the legislature clearly has indicated a contrary intent. Attorney General Opinions M-983 (1971) at 2 (citing 53 TEX. JUR. 2d *Statutes* § 28, at 51); V-1354 (1951) at 2 (citing *Freeman v. Terrell*, 284 S.W. 946 (1926)); *see also* Tex. Const. art. I, § 16; Attorney General Opinions WW-847 (1960) at 1-2 (quoting *State v. Humble Oil & Ref. Co.*, 169 S.W.2d 707 (1943)); WW-518 (1958) at 3 (quoting 39 TEX. JUR. 54). A statute does not operate retroactively merely because it relates to antecedent events. 73 AM. JUR. 2d *Statutes* § 348, at 486 (1974).

Prior to January 1, 1992, an individual could perform services that we currently term "chemical dependency counseling services" without a license. Most of the grounds for discipline that V.T.C.S. article 4512*o*, section 16 lists apply only to actions that a licensed chemical dependency counselor, or a person claiming to be a licensed chemical dependency counselor, may commit. To discipline a person today for committing an act that was completely legal at the time the person acted would contravene the prohibition against the enactment of retroactive laws. Thus, the commission may not investigate any complaint regarding the commission of an act, alleged to have occurred before January 1, 1992, by a person who is or who is applying to be a licensed chemical dependency counselor, even though the act, if committed on or after January 1, 1992, is cause for discipline under section 16(1), (2), (3), (5), (6), and (8).

Section 16(4), however, authorizes the commission to discipline a person who engaged in false, misleading, or deceptive conduct as Business and Commerce Code section 17.46 defines it. Section 17.46 of the Business and Commerce Code makes unlawful "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce," and the section lists several acts that constitute false, misleading, or deceptive acts or practices, including passing off goods or services as those of another, representing that goods are original or new if they are not, and knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service. The acts section 17.46 prohibits have been unlawful since 1967, when the legislature enacted the statutory predecessor to section 17.46. *See* Acts 1967, 60th Leg., ch. 274, § 2, at 608, 658. In our opinion, therefore, the commission may investigate any claims that, prior to January 1, 1992, a person who is now, or who is applying to be, a licensed chemical dependency counselor engaged in false, misleading or deceptive conduct in violation of section 17.46 of the Business and Commerce Code. The reference in section 16 to these

illegal, antecedent events does not contravene the general prohibition against the retroactive operation of a statute.

Similarly, section 16(7) authorizes the commission to discipline a person who has had a license to practice chemical dependency counseling refused, suspended, or revoked in another jurisdiction if the reason for the refusal, suspension, or revocation is one that the commission finds would violate article 4512o or the rules the commission has promulgated pursuant to article 4512o. If, prior to January 1, 1992, a person committed an unlawful act in another state that resulted in the refusal to issue, suspension, or revocation of that person's license to practice chemical dependency counseling in that state, we believe that the commission may investigate a complaint regarding that unlawful act. In our opinion, the reference in section 16(7) to these antecedent events does not contravene the general presumption against the retroactive operation of statutes.

Finally, section 16(9) authorizes the commission to discipline a person who has violated Penal Code section 21.14 or who is liable under Civil Practice and Remedies Code chapter 81. Both section 21.14 of the Penal Code and chapter 81 of the Civil Practice and Remedies Code concern sexual exploitation by a mental health services provider. The legislature added subsection (9) to V.T.C.S. article 4512o, section 16 in 1993. *See* Acts 1993, 73d Leg., ch. 573, § 2.04, at 2157, 2166. By the same act, the legislature enacted section 21.14 of the Penal Code, *see id.* § 2.02, at 2164-66, and chapter 81 of the Civil Practice and Remedies Code, *see id.* § 2.01, at 2161-64. The 1993 enactment became effective September 1, 1993. *See id.* § 6.01, at 2174. Prior to September 1, 1993, therefore, no cause of action existed for a violation of Penal Code section 21.14 or Civil Practice and Remedies Code chapter 81. Sexual exploitation by a mental health services provider was unlawful under other laws, however. *See* Penal Code §§ 22.01(a)(3), 22.011; *see also* Acts 1993, 73d Leg., ch. 573, § 2.08, at 2157, 2168 (stating that Civil Practice and Remedies Code chapter 81, as added in 1993, "applies only to a cause of action accruing on or after the effective date of this article. A cause of action accruing before that date is governed by the law in effect at the time the cause of action accrued, and that law is continued in effect for that purpose"). Consequently, the commission may investigate a mental health services provider who sexually exploited a patient and who now has or has applied to have a license to practice chemical dependency counseling for conduct that occurred prior to January 1, 1992, without violating the prohibition against retroactive laws.

Section 150.22 of 40 T.A.C. prescribes ethical standards for licensed chemical dependency counselors. It was not effective until January 10, 1992. Additionally, by its terms it applies only to licensed chemical dependency counselors. Accordingly, the commission may not investigate any alleged violations of the ethical standards that occurred prior to their effective date.

S U M M A R Y

The Texas Commission on Alcohol and Drug Abuse may not investigate a complaint regarding the conduct of a person practicing as a chemical dependency counselor if the alleged conduct occurred prior to January 1, 1992, and violates V.T.C.S. article 4512o, section 16(1), (2), (3), (5), (6), or (8). However, the commission may investigate a claim that, prior to January 1, 1992, a person who is now a licensed chemical dependency counselor, or who is applying to be a licensed chemical dependency counselor, violated V.T.C.S. article 4512o, section 16(4), (7) and (9) because the actions specified in those subsections were unlawful prior to the effective date of article 4512o.

The commission may not investigate any alleged violations of 40 T.A.C. section 150.22 that occurred prior to section 150.22's effective date, January 10, 1992.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kimberly K. Oltrogge", written in a cursive style.

Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee